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No. 89-202

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GEORGE D. NEWMAN & SONS, INC.
Petitioner,

VERSUS

WASHINGTON SUBURBAN SANITARY COMMISSION
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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49pp

QUESTIONS PRESENTED

1. Whether the refusal of the WSSC to disqualify the low bidder, certified by an independent State agency as a black owned business, from the award of a contract under a voluntary minority business enterprise program based upon the claim of a disappointed higher bidder, also certified as a black owned business, that the low bidder was in reality under the control of non-minority owned businesses constitutes race discrimination against the disappointed bidder?

2. Whether the Fourth Circuit was correct in affirming the decision of the District Court that the failure of Newman to exhaust its administrative remedies by filing a protest of the award under WSSC regulations deprived the Court of subject matter jurisdiction over Count II under Maryland law?

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TO THE HONORABLE, THE CHIEF JUSTICE
AND THE ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES

The Respondent, Washington Suburban Sanitary Commission, respectfully requests that this Court deny the Petition for Writ of Certiorari.

STATUTORY & CONSTITUTIONAL PROVISIONS INVOLVED

United States Code, Title 42 §1983.

United States Code, Title 42 §2000(d).

Washington Suburban Sanitary Commission Minority Business Enterprise Policy.

STATEMENT OF THE CASE

A. FACTS ALLEGED

The facts, as alleged by the Petitioner in the Amended Complaint and the attachments thereto, are as follows:

The Washington Suburban Sanitary Commission (hereinafter WSSC) is an agency of the State of Maryland responsible for providing water and sewer service within Prince George's and Montgomery Counties in Maryland. The WSSC issued an Invitation for Bids (hereinafter IFB) on Contract No. 17224 (hereinafter Contract) on February 24, 1988. (A1). The Contract is for the hauling, storage, and disposal of approximately 400 wet tons per day of undigested, lime-amended sewage sludge produced at the Blue Plains Wastewater Treatment Plant in the District of Columbia. (A4, A22). The WSSC expressly reserved the right to reject all bids and advertise for new bids. (A3).

The IFB restricted bidding on this Contract to certified minority business enterprises (hereinafter MBE) pursuant to the WSSC MBE Policy. (A6). The WSSC MBE Policy is a voluntary affirmative action plan adopted by the WSSC designed to increase the participation of MBEs in procurement contracts awarded by the WSSC. (A7). The purchasing agent has a variety of options under the WSSC MBE Policy, including restricting bidding on specific

contracts to MBEs. The WSSC does not certify firms as MBEs. Rather, the WSSC requires a firm to be certified as an MBE by other independent government agencies, such as the Maryland Department of Transportation and the Maryland Minority Business Enterprise Certification Council. An MBE awarded a contract under the WSSC MBE Policy is prohibited from subcontracting more than forty percent of the Contract to non-minority owned businesses. (A11).

The WSSC received three bids for the Contract from certified MBEs. A low bid was submitted by Hardy and Son Trucking, Inc. (hereinafter Hardy), an MBE certified as such by the Maryland Department of Transportation. (A19, A23-24). The Petitioner, Newman, submitted a bid with an estimated price of six hundred fifty-three thousand seven hundred thirty dollars ($653,730) more than Hardy's prompt payment price. (A24). Newman is certified as an MBE by the Maryland Minority Business Enterprise Certification Council. (Pet. Apx. 3a).

After the bid opening, but prior to the award, Newman filed a letter dated June 7, 1988 with the purchasing agent protesting Hardy's bid. Newman claimed that Hardy's bid was not responsive for a variety of reasons, including an assertion upon information and belief that Hardy was controlled by non-minority businesses. (A15). Newman was informed by letter dated June 16, 1988 that WSSC regulations do not permit a protest of a bid. The letter also advised Newman that the protest could be resubmitted after the award. (A26).

Newman sent a letter dated June 22, 1988 to the Director of Maintenance and Operations seeking a review of their protest of Hardy's bid. (A27). Once again, Newman was informed by letter dated July 1, 1988 that WSSC regulations authorize protests of either the solicitation or the award of a contract, but not of a bid. Newman was expressly told that they could resubmit the protest within fifteen days after the award if they still felt it was valid. (A29).

The Contract was considered at the June 29, 1988 and the August 17, 1988 public meetings of the WSSC. Counsel for Newman was permitted to set forth Newman's position at both public meetings. The Contract was awarded to the low bidder, Hardy, at the August 17, 1988 public meeting of the Commission. (A29-30). Newman never resubmitted its protest after the award of the Contract. (Pet. Apx. 5a-6a)

B. THE LITIGATION.

Newman filed a Complaint along with a Motion for Temporary Restraining Order and Preliminary Injunction in the United States District Court for the District of Maryland on August 18, 1988. The Complaint claimed in Count I that the award of the contract to Hardy constituted discrimination on the basis of race in violation of 42 U.S.C. §1983 and 42 U.S.C. §2000(d) because Hardy, although a certified MBE, was in reality under the control of two businesses owned by persons who are not minorities as defined under the WSSC MBE Policy. Count II of the Complaint attempted to set forth a cause of action

for abuse of discretion in awarding the Contract under Maryland law.

After a hearing held on August 18, 1988, United States District Judge Norman F. Ramsey issued an oral opinion and order denying Newman's Motion for a Temporary Restraining Order. Counsel for Newman conceded at the hearing that the court lacked the authority to order award of the Contract to Newman and subsequently amended the Complaint to delete Newman's prayer for such relief on August 25, 1988.

The WSSC filed a Motion to Dismiss the Amended Complaint on September 9, 1988. On October 3, 1988, United States District Court Judge Frederic N. Smalkin issued a Memorandum and Order granting the Motion to Dismiss the Amended Complaint. Judge Smalkin held that Count I failed to state a claim upon which relief can be granted and was so frivolous that it failed to present a federal question at all. Count II was dismissed due to lack of subject matter jurisdiction and in the alternative that the exercise of federal abstention was appropriate.

Newman filed an appeal to the United States Court of Appeals for the Fourth Circuit on October 5, 1988. The decision of the District Court was affirmed in a *per curiam* opinion dated April 14, 1989 by the United States Court of Appeals for the Fourth Circuit. Newman's request for rehearing *en banc* was denied on June 5, 1989.

REASONS WHY THE PETITION SHOULD BE DENIED

I. NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE QUESTIONS PRESENTED IN THE PETITION.

The only federal question raised in the Petition is "whether treating minority fronts as minorities was justified under a racially discriminatory affirmative action plan intended to benefit minorities." (Petition 8.) Neither the District Court nor the Fourth Circuit needed to address this issue since it was not raised in the Amended Complaint.

This case involved a challenge by the second low bidder to an award of a contract to the low bidder. Both the low bidder and the Petitioner are MBEs certified as such by independent State agencies. The facts set forth in the Amended Complaint raised the question of whether the regulations adopted by the WSSC in implementing the MBE Policy were followed in the award of this Contract.

The WSSC accepted Hardy's bid because Hardy is certified as an MBE by the Maryland Department of Transportation and it was the low bid. Newman claimed that the WSSC should have rejected the Hardy bid as non-responsive since Hardy was a minority front controlled by a white owned company. It is the refusal of the WSSC to look behind the certification of the Maryland Department of Transportation that forms the basis of the Amended Complaint. Whether or not the WSSC should have done this is a question of State law unique to the regulatory scheme adopted by the WSSC

to govern the award of its procurement contracts. Both the District Court and the Fourth Circuit concluded that there was no reason to decide this issue on its merits since it did not raise a federal question sufficient to confer federal jurisdiction.

The Petitioner's argument that the decision of the Fourth Circuit clashes with the decisions of this Court in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), and *J. A. Croson Company v. City of Richmond*, 109 S.Ct. 706 (1989),[1] is without merit.[2] The Amended Complaint did not attack the legality of the MBE Policy adopted by the WSSC under the Fourteenth Amendment Equal Protection Clause. Such a direct attack would have been futile since it is the viability of that voluntary affirmative action plan that supports the Petitioner's claim that it should have been awarded the Contract in dispute. Both *Fullilove* and *Croson* involved a direct challenge to a voluntary affirmative action plan brought by non-minorities that were denied the preferential treatment afforded to minorities under the plan. Newman was not denied the right to compete under the WSSC MBE Policy as a minority.

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[1] .The Petitioner's failure to understand the decision of this Court in Croson is highlighted by the incorrect assertion that the decision of the Fourth Circuit was reversed twice by this Court.

[2]Judge Sprouse who participated in both *Croson* decisions was a member of the Fourth Circuit panel that heard and decided the instant case.

The Petitioner's belated attempt to portray the Amended Complaint as establishing a *prima facie* case of racial discrimination pursuant to *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973), ignores a crucial fact. Under both *McDonnell Douglas* and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), a plaintiff must show that he or she is at least as qualified as the non-minority selected. In the competitive bidding arena, selections among qualified bidders are made on the basis of price. Newman never alleged that it put in a bid to perform the sludge hauling for the lowest price. In fact, the Amended Complaint concedes that the award went to the lowest bidder.

II. THE FACTS OF THIS CASE ARE PECULIAR AND ARE NOT LIKELY TO RECUR

The Fourth Circuit concluded that Newman had an administrative remedy under State law that included the full panoply of due process rights, but failed to avail itself of this right. The Amended Complaint and the attachments thereto made it clear that Newman's protest was filed prematurely and that it never filed a timely protest as required under State law. In fact, the WSSC expressly informed Newman that its protest was prematurely filed and advised Newman as to the proper time to file the protest. Newman's refusal to heed this advice led the District Court and the Fourth Circuit to conclude that there was no jurisdiction to hear the present suit.

The Petitioner's reliance on the recent decision of this Court in *Coit Independent Joint Venture v. FSLIC*, 109 S.Ct. 1361 (1989), as a reason for this Court to review this case is also misplaced. While the sufficiency of an administrative remedy created by a federal statute applicable nationwide is surely of sufficient importance to merit review by this Court, the protest procedure established by WSSC procurement regulations is quite a different situation. This protest procedure applies to only some of the contracts awarded by the WSSC. It is important only to those companies that bid on such contracts and would be of no broad public importance.

This case is simply a dispute under State law over the award of a State contract. The lack of a decision on the merits below was a direct result of the Petitioner's failure to perfect an appeal under State law.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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ASSOCIATE COUNSEL

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APPENDIX

APPENDIX

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Extract from General Conditions and Instructions for Bidders or Offerors. ¶13. Right to Accept or Reject Bids. Exhibit A, Amended Complaint. A3

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Letter of June 22, 1988 to
Cortez A. White, Director
of Maintenance and Operations.
Exhibit L, Amended Complaint . A27

Letter of July 1, 1988 to Mark
Rollinson from Cortez A. White.
Exhibit M, Amended Complaint. A29

IFB for Contract No. 17224, Cover letter Exhibit A, Amended Complaint.

February 24, 1988

Re: IFB for Contract No. 17224

To All Interested Bidders:

Sealed Bids are hereby invited, addressed to the Purchasing Office, Washington Suburban Sanitary Commission, for

CONTRACT NO. 17224

as described in this Invitation for Bids. The Bids will be received in the Purchasing Office of the Washington Suburban Sanitary Commission, Warehousing Building, Second Floor, 4101 Lloyd Street, Hyattsville, Maryland, 20781 until

WEDNESDAY, MAY 25, 1988 AT 2:30 P.M.

at which time and place they will be publicly opened and read.

All Bids must be submitted with one original and two copies upon the attached forms, must give the price in figures for the proposed purchase, and must be signed by the Bidder with his name and address. Each Bid must be enclosed in a sealed envelope and have written on the face of the envelope:

CONTRACT NO. 17224 FOR BLUE PLAINS SLUDGE HAULING AND/OR HAULING AND DISPOSAL

FAILURE OF A BIDDER TO SUBMIT ONE ORIGINAL AND TWO COPIES OF HIS BID MAY RENDER THE BID NONRESPONSIVE AND THE BID MAY NOT BE CONSIDERED FOR AWARD.

If forwarded by mail, the sealed envelope containing the Bid, marked as directed above, must be enclosed in another envelope addressed as specified in this document and sent, preferably, by registered mail. This Invitation for Bids is prepared in two parts: Part One contains General Provisions. Part Two contains all forms which the Bidder must complete, such as affidavits, bonds, and price submissions. Part One should be retained by the Bidder. A copy of Part Two should be retained by the Bidder and the original of Part Two forwarded to the Washington Suburban Sanitary Commission as indicated above.

Sincerely,

By: Paul A. Turack
Contracts Supervisor

PAT/map

Extract from General Conditions and Instructions for Bidders or Offerors, 13. Right to Accept or Reject Bids, Exhibit A, Amended Complaint.

13. RIGHT TO ACCEPT OR REJECT BIDS: The Commission hereby reserves the right to accept or reject all or part of any or all Bids, item by item, and to advertise for new Bids, as the interests of the Commission may require. (Part One, pg. 8 of 23)

Extract from General Conditions and Instructions for Bidders or Offerors, 1. Project Scope, Exhibit A, Amended Complaint.

1. PROJECT SCOPE: This contract covers the hauling and/or hauling, storage and disposal of varying quantities of municipal sludge from the District of Columbia's Blue Plains Wastewater Treatment Plant (WWTP). Sludge shall be delivered to the Washington Suburban Sanitary Commission's (Commission) Montgomery County Composting Facility (MCCF), Montgomery Industrial Park, 2201 Industrial Parkway, Silver Spring, Maryland 20904, and/or delivered and applied at Contractor-provided land disposal sites and/or storage at facilities outside of Prince George's County, Maryland. The sludge to be hauled and/or hauled, stored, and disposed of is undigested sludge which is lime-amended only to the extent necessary for the dewatering process.

The Contractor shall do any and all work and furnish all the supervision, labor, equipment, components, materials, permitted sites, storage facilities, permits, tools and other resources and appurtenances necessary or proper for the performance and completion of this Contract, in the manner called for by the terms and conditions herein, and to the satisfaction of the Commission. The Contractor shall be responsible for adhering to all applicable laws, statutes, regulations, ordinances,

permits, and directives during the performance of this Contract.

The Contractor shall comply with all of the terms and conditions contained herein and which are hereby made a part of this Contract. The submission of a Bid shall be considered as *prima facie* evidence that the Bidder has visited the WWTP and MCCF and familiarized himself with and understands the conditions under which this Contract shall be awarded, performed, and administered. No letter or stipulation submitted with a Bid shall alter the terms of this Contract. (Part Two, pg. 2 of 30)

Extract from General Conditions and Instructions for Bidders or Offerors, 27. Basis for Award, Exhibit A, Amended Complaint.

27. BASIS OF AWARD: This Contract shall be awarded to the lowest, responsive and responsible certified minority Bidder who has received all approvals and made all submissions as required herein in accordance with the Commission's Minority Procurement Policy, a copy of which is attached. (Part Two, pg. 14 of 30)

WSSC MINORITY BUSINESS ENTERPRISE POLICY
Exhibit A, Amended Complaint

WASHINGTON SUBURBAN SANITARY COMMISSION
HYATTSVILLE, MARYLAND

MINORITY PROCUREMENT POLICY
(AN EXCERPT FROM THE PURCHASING MANUAL)

The Washington Suburban Sanitary Commission is committed to increasing the participation of enterprises owned by minorities in its procurement of commodities and services.

1. **Goals and Procedures.**

In order to meet this policy commitment, the WSSC will: one, increase the number of minority-owned firms responding to Commission procurement requirements; and two, increase the dollar value of awards to enterprises owned by minorities.

a. Increase Minority-Owned Firms Responding to Commission Procurement Requirements.

The Purchasing Agent and Minority Business Enterprise (MBE) Officer will actively search for and identify minority-owned firms which provide commodities and services required by the Commission. To achieve this goal, the Purchasing Agent and MBE Officer will use such organizations as the Greater Washington Business Center, the Maryland Minority Business Enterprise Certification Council (MBECC), the National Minority Purchasing Council, Inc., the Maryland Department of Transportation, the Maryland Department of General Services and other resources. The

Purchasing Agent and MBE Officer will also actively encourage such firms to bid on commodity and service contracts offered by the Commission.

b. Increase Procurement Awards to Minority-Owned Enterprises.

As a goal, the Purchasing Agent will strive to award to minority-owned firms at least 25% of the total dollar value of all procurement contracts which are awarded during a fiscal year. In order to meet this goal, the Purchasing Agent will utilize one or more of the following procedures:

1.) Direct that contracts which, in the Purchasing Agent's judgment, lend themselves to the use of subcontractors include a mandatory minority subcontractor utilization clause equivalent to at least 10% of the contract's total value.

2.) Require or recommend that a procurement contract be awarded to a minority-owned firm which has submitted a bid within 10% (inclusive) of the low bid. Approval of such recommendations will be based on the Commission Delegation of Authority for Standard Procurement actions. Minority Business Enterprise awards within 10% of the low bid do not apply when the manufacturer supplying the subject minority company also bids independently on the same contract.

3.)Require or recommend that competitive bidding of

procurement contracts be restricted to minority-owned firms. Restricting competitive bidding on contracts whose estimated value exceeds $50,000 will require the following approvals:

Estimated Contract Value	Approval Level Required
$50,000 -75,000	Materials & Procurement Division Head
$75,001-100,000	Supply & Resource Control Bureau Director
Over $100,000	Maintenance & Operations Department Director

4.) Require or recommend that procurement contracts be directly negotiated with one or more minority-owned firms. Negotiating contracts whose estimated value exceeds $50,000 will require the approval levels stated in 3.) above.

5.) Waive or reduce all or part of the Commission's bonding and/or insurance requirements for minority-owned firms (if the Purchasing Agent judges that the requirements would deny the minority-owned firm an opportunity to perform the contract which the firm has shown itself otherwise capable of performing).

6.) Recommend waiver of a bid's or proposal's corporate experience requirement for a minority-owned firm if the firm has at least a year's relevant corporate experience and the firm's principals have

has at least a year's relevant corporate experience and the firm's principals have considerable similar experience prior to forming or joining the firm.

c. The Purchasing Agent shall consider the following criteria in selecting one or more of the minority procurement procedures authorized above prior to awarding a contract under this program:

1.) Whether the procedure selected is likely to increase the number of minority-owned firms responding to Commission procurement requirements in the future.

2.) Whether the procurement selected is likely to increase the dollar value of procurement awards to minority-owned firms in the future.

3.) Whether the procedure selected is likely to further the Commission's goals under this program without unnecessarily interfering with the efficient operation of the Commission.

4.) Whether the procedure selected is the most effective alternative available which will further the Commission's goals under this program.

2. **Minority-Owned Suppliers and Distributors.**

Minority Business Enterprise awards within 10% of the low bid do not apply when the manufacturer supplying the subject minority company also bids independently on the same contract.

3. **Utilization of Non-Minority Subcontractors.**

Any minority-owned firm which is awarded a Commission contract under procedure 1.b.2.), or 3.) or 4.) above may not subcontract more than 40% of the contract value to a firm owned by a non-minority. (It is the intent of this provision to ensure that the minority contractor is the recipient of at least 60% of the contract funds.) The failure of a minority firm to abide by this subcontracting limitation may be grounds for terminating the contract in accordance with the Contract General Conditions concerning Termination for Default.

4. **Utilization of Minority Subcontractors.**

a. The failure of a non-minority-owned firm to meet a mandatory minority subcontracting utilization clause may be grounds for terminating the contract in accordance with the Contract General Conditions concerning Termination for Default.

b. Subcontractors utilized under a mandatory minority subcontracting provision of a WSSC contract are prohibited from:

1.) further subcontracting any work under the contract, or

2.) utilizing goods, equipment, services or employees procured, rented or leased from the prime contractor or a company owned by the prime contractor.

c. Subcontractors proposed for utilization under a mandatory minority subcontracting provision must be prepared to work at the time of bid submittal by the prime contractor. Prior to bid submittal by the prime contractor, the minority subcontractor must have obtained approved minority certification (as indicated below

in Section 6.b.2.), all necessary licenses, permits, insurance, etc.

5. **Request for Proposals.**

Offers received in response to a Request for Proposals (RFP) shall be subject to an evaluation procedure that awards additional points for contract participation by minority-owned firms. The number of points awarded shall be directly proportionate to the percent of minority business participation. The maximum number of points to be awarded under this procedure shall not exceed 15% of the total number of points available.

6. **Definition: Minority-Owned Firms.**

a. A minority person is defined as a member of one of the following groups: Blacks, Hispanics, American Indians, Alaskan Natives, Asians or Pacific Islanders, females or the physically or mentally disabled.

b. A minority-owned firm is defined as:

1.) any legal entity organized to engage in commercial transactions which is at least fifty-one percent (51%) owned and controlled by one or more minority persons, and

2.) a firm which has been certified as minority-owned by the Maryland Department of Transportation, Maryland Minority Business Enterprise Certification Council or the Minority Business Opportunity Commission (District of Columbia), or any governmental certification agency which substantially duplicates the requirements of the Maryland Department of Transportation and which is approved by the MBE Officer. A listing of approved certification agencies is available from the MBE office. Evaluation of proposed

certification agencies for approval will not be conducted for pending procurements.

7. **Contract Review/Audit.**

a. The MBE Officer shall have the right to periodically monitor work performed under a contract awarded under this policy to ensure compliance with all applicable provisions of this policy. The contractor and/or subcontractor shall grant the MBE Officer or his representative access to the contractor's or subcontractor's work site and place of business. Suspected instances of policy non-compliance shall be reported to the Internal Auditor and General Counsel for investigation.

b. The Internal Auditor shall perform random audits of contracts awarded under this policy to ensure compliance with all applicable provisions of this policy. Documented cases of fraud or impropriety shall be referred to the General Counsel for legal action.

8. **Goals Review.**

a. The Purchasing Agent will maintain records and statistics on contract bids and awards to minority-owned firms and prepare a quarterly report summarizing such activity for the Commission, the MBE Officer and MBE Advisory Committee. (The latter report will include a listing of all contracts above $2,500 which have been directly negotiated with a minority-owned firm.) The Purchasing Agent will also report on any problems encountered or anticipated in meeting policy goals.

b. The MBE Officer will periodically monitor procurement requisitions to assist the Purchasing Agent in identifying minority-owned firms offering services or commodities covered by those requisitions. The MBE Officer will also provide help and

assistance to minority-owned firms encountering difficulties in responding to procurement bid solicitations or in achieving certification of their minority ownership. Finally, the MBE Officer will report separately to the Commission and the MBE Advisory Committee on Purchasing's progress in achieving the goals established for awards to minority-owned firms.

c. The MBE Advisory Committee, which will include a Commissioner, the General Manager, the Purchasing Agent, MBE Officer, a representative of a minority-owned firm and a representative of a non-minority-owned firm, will be responsible for monitoring the implementation and progress of the MBE program. The Committee will also recommend to the Commission possible methods to resolve problems Purchasing may encounter in achieving the minority award goals established under this policy.

d. The Commission will conduct a public hearing annually in order to solicit public comments on the Minority Procurement Program. The Commission shall review the program annually for the purpose of determining what changes, if any, are necessary.

NOTE: The policy and procedures delineated above take precedence over applicable sections of Commission procurement policies as outlined in the Purchasing Manual.

Letter of June 7, 1988 to Sally Barkley
Exhibit C, Amended Complaint

June 7, 1988

Mrs. Sally Barkley
Purchasing Agent
IFB for Contract Number 17224
Washington Suburban Sanitary Commission
4101 Lloyd Street
Hyattsville, Maryland 20781

Dear Mrs. Barkley:

George D. Newman & Sons, Inc. (hereinafter, "Newman & Sons"), through us, their undersigned counsel, do hereby protest the bid of Hardy & Son Trucking, Inc. (hereinafter, "Hardy") in IFB for Contract Number 17224, opened May 25, 1988.

There are two broad grounds for protest. First, the Hardy bid is non-responsive. Second, an award to Hardy would be against the public interest. Please consider the following.

1. Hardy Bid Non-Responsive.

The Hardy bid is non-responsive in three major respects. First, there is no legitimate provision for storage of sludge. Second, Hardy is not a minority contractor for purposes of the bid. Third, Hardy is not qualified to do business in Maryland.

1.1. NO PROVISION FOR STORAGE OF SLUDGE.

The Hardy bid proposes a single storage facility to be constructed in King George County, Virginia under Bio-Gro Systems, Inc. Non-Discharge Certificate IW-ND-1656, which proposal is non-responsive in two respects.

1.1.1. Site Too Small.

Non-Discharge Certificate IW-ND-1656 relates to 181.5 acres of property owned by S. Dorsey Edwards, Jr.[1] By regulation in King George County, stored sludge may not be re-transported but ". . . shall be for use of the farm upon which it is located." (Article 4, Supplementary Regulations, Section 4.6, Land Application of Class A Sludge, Section 4.6.2.3.)

Assuming that the entire 181.5 acre tract would prove suitable for spreading, the maximum capacity would be approximately 15,000 wet tons over a five year period under Virginia Regulations.

The subject IFB requires capacity of 18,000 wet tons being available at all times (Part Two, Page 8).

Therefore, the Hardy bid on its face provides for inadequate storage.

1.1.1. Site Not "Permitted".

The subject IFB specifically states (in underlined language, for emphasis) that the bidder must show proof of permitted sludge storage facilities. The Hardy bid shows proof of permission to construct a storage facility. However, the storage facility has not been constructed and, under Virginia Regulations, cannot be finally certified to receive sludge until it has been inspected favorably after construction.

The term "permitted" is defined in the subject bid documents at page 5 of Part One

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[1]Substantial additional acreage nearby is also proposed under the Hardy bid. However, the additional acreage (a) has a different owner and (b) is not adjacent, being separated by a tract belonging to Lewis Ashland.

as "approved by, accepted by, satisfactory to, or permitted by the General Manager."

Surely an ephemeral, unconstructed storage facility, which may or may not come to be approved by appropriate authorities, cannot be said to satisfy such important and certain requirements as those in the subject bid documents, to the satisfaction of the General Manager.[2]

1.2. HARDY NOT A "MINORITY CONTRACTOR".

The subject procurement is set aside for minority contractors, defined by the Commission as contractors 51% owned and "controlled" by minorities.

On information and belief, for purposes of the subject procurement Hardy is not minority "controlled". Therefore, Hardy is not a "minority contractor" within the letter or the spirit of Washington Suburban Sanitary Commission's Minority Procurement Policy published as part of the subject bid materials.

1.2.1. Commission Power To Question.

According to Nathan Greenbaum, Esq., counsel to the Commission, if a contractor or bidder is certified as a minority contractor by one of the accepted certifying agencies, normally the Commission is powerless to question the

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[2]There is Washington Suburban Sanitary Commission precedent for disqualifying a bid for far less. For example, in late 1983 the low bidder for a sludge hauling contract was disqualified because he did not have his hauling permit in hand at the time of the bid. He merely had a commitment from the Commonwealth of Virginia that he would receive his hauling permit once he had a contract in hand.

certification and has not, and will not do so as a matter of policy.[3]

However, the Commission's own statement of Minority Procurement Policy (hereinafter, the "Policy") belies Mr. Greenbaum's position.

For example, the definition of a minority firm, set forth at Section 6 of the Policy, requires minority control and certification by one of the approved agencies. Had the Commission not intended to reserve to itself the right to make judgment as to "control", the conjunctive would not have been used.

In addition, Section 7 of the Policy implies a reservation of right of determination in the Commission. Section 7 imposes a duty upon the MBE Officer to monitor compliance as to minority status during a contract. Section 7 also imposes a duty of random audits upon the Internal Auditor to determine compliance. If such determination must be made during the course of a contract, surely the Commission has the same power ab initio.

Most telling, however, is the obvious observation that the Commission must have realized that a concern might be minority "controlled" for some purposes and not for others. For example, a concern might be minority "controlled" for purposes of small trucking jobs but "controlled" by another for purposes of a very large and complex contract beyond the capabilities of those

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[3]In a telephone conversation with the undersigned on May 31, 1988, Mr. Greenbaum so stated.

who are normally in "control" of the concern.[4]

Such is the case at hand.

1.2.2. "Control" in the Case at Hand.

On information and belief, Hardy is certified by the Maryland Department of Transportation, one of the Commission approved certifying agencies.

Newman & Sons does not question the bona fides of such certification or that, for some purposes, Hardy may not indeed be a minority concern.

However, also on information and belief, for purposes of the subject procurement, Hardy is "controlled" by one or more instrumentalities of the Bevard family in Prince George's County. (See Exhibit A hereto, "Summary of Material Facts about Bidder Hardy".)

1.3. HARDY NOT QUALIFIED IN MARYLAND.

Hardy & Son Trucking, Inc. is a District of Columbia corporation. It was qualified to do business in Maryland from August 26, 1985 until December 19, 1986, at which time its Maryland qualification was allowed to lapse and has not been renewed.

Qualification to do business in Maryland is a prerequisite to bidding the

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[4]Ascertaining "control" involves subjective analysis which has plagued the U.S. Small Business Administration and others. In considering "control" it is useful to look to the purpose of minority set-aside programs, namely to nurture a management and entrepreneurial class among minorities. Obtaining these decision-making skills has been likened to learning to walk in the sense that no one else can do it for you -- only by your own stumbling and repeated tries can the skill be obtained.

subject procurement. (See Paragraph 22, Part One, page 10.)

2. Public Policy Considerations.

The Commission has reserved to itself the right to reject any bidder who cannot demonstrate to the Commission "that he has the necessary competence, capability, capacity, credit, integrity, perseverance and tenacity to complete this Contract". (See Item 12, Responsibility of Bidders, Part One, page 8.)

2.1. LACK OF FINANCIAL RESPONSIBILITY.

Hardy, standing alone, does not have the financial capacity to perform. (See Exhibit A hereto, "Summary of Material Facts about Bidder Hardy".)[5]

2.2. LACK OF INTEGRITY.

Nor does Hardy have the integrity to perform. As Exhibit A makes clear, persons in nominal control of Hardy have extensive criminal records, including conviction for receiving stolen goods, grounds for debarment by the Commission's own policies.[6] In matters as sensitive to the public awareness as disposal of sewage sludge, prudence speaks for taking great care to delegate responsibility to persons who have a demonstrated record of respect for law. Hardy clearly cannot meet such a standard.

For the foregoing reasons, the bid of Hardy & Sons Trucking, Inc. in respect of IFB Contract Number 17224 must be rejected.

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[5]Any suggestion that Hardy does not stand alone goes, of course, to the "control" issue raised above.

[6]WSSC Purchasing Manual, Section 11.B.3.b.

It is so requested.

Respectfully submitted,
Smith Rollinson, by Mark Rollinson, Maryland Client Security Trust Fund Number 900007132.
Attorneys for George D. Newman & Sons, Inc.

BY: Mark Rollinson

Staff Memorandum: Proposed Contract
17224 Disposal of Blue Plains Sludge
Exhibit L, Amended Complaint

PROPOSED CONTRACT 17224
DISPOSAL OF BLUE PLAINS SLUDGE

The Contract: The proposed contract requires the disposal of approximately 400 wet tons of sludge a day generated by the Blue Plains Wastewater Treatment Facility. The contractor must haul approximately 200 wet tons a day to Site II and to haul and dispose of the remaining estimated 200 wet tons a day at contractor-secured permitted sites. The contract term is three years, ten and a-half months.

The Solicitation: Bids on the contract were solicited from only minority-owned firms. Each bidder was required to include with his bid a number of submittals including "complete copies of all permits required for use in the performance of this contract," specifically:

1. complete copies of disposal permits covering sites with a total capacity of at least 18,000 wet tons,
2. complete copies of permits for storage facilities with a total capacity of at lease 18,000 wet tone (or an alternate plan to "store" at least 18,000 wet tons), and
3. any haul permit required to perform the contract.

Initial Bid Evaluation: Three bids were received on the contract. Following evaluation of the bids, staff recommended award of the contract to Hardy and Sons Trucking. Hardy rendered the lowest bid. The bid also appeared to be the only responsive bid, except that it failed to include county disposal and storage permits which allegedly Hardy needed to use his

State permitted disposal and storage sites. Consequently, the award recommendation included a proviso that the staff verify that either the county permits were not required or that the required permits were issued prior to the bid closing date of May 25. At its June 29 meeting, the Commission remanded the contract to staff for further study.

Subsequent Bid Evaluation: Following the Commission's action, the staff provided Hardy an opportunity to clarify its bid, to specifically submit the allegedly required county permits. The two other bidders, George D. Newman and Sons, Inc. and MTI Construction Company, Inc. whose initial bids failed to include all required submittals were also given a similar opportunity to clarify their bids. Each bidder responded to the staff's bid clarification request. What follows is a summary of the staff's evaluation of each firm's initial bid and its subsequent bid clarification:

> Hardy: The lowest priced bid, nearly 11% below the lowest price solicited nearly three and a-half years ago. Hardy's bid also now includes all required submittals, including a county sludge disposal permit issued in April 1986 and a "Zoning and Building Permit" covering the State permitted storage site issued June 10, 1988, about two and a-half weeks after the bid deadline date. The latter permit also, at least theoretically, effectively reduces the capacity of the proposed storage facility to an estimated 15,000 wet tons, slightly under the minimum required 18,000 wet tons. Hardy is also now properly registered with the Maryland State Department of Assessments and Taxation, a

contracting rather than a bidding requirement.

Newman: Newman's bid price is $498,080 above Hardy's base price and $653,730 above Hardy's prompt payment discount price. Newman's bid includes all submittals, except a State permit required to haul sludge to Site II. Newman's attorney acknowledged in his response to the bid clarification request that Newman did not have the requested haul permit. Subsequently, following the deadline date established for responses to WSSC's bid clarification request, Newman's attorney delivered the requested haul permit, a haul permit issued of course after the bid closing date.

MTI: MTI's bid price is $812,210 above Hardy's base bid price. Like Hardy, MTI offers a prompt payment discount price, 2-1/2% versus Hardy's 2%. MTI's prompt payment price is $752,780 above Hardy's prompt payment price. MTI's bid now includes all required submittals. However, the bid requires further clarification regarding MTI's specific sludge storage plans.

Summary and Recommendation: The staff recommends award of the contract to Hardy. Hardy has submitted the lowest priced bid. The bid price is also well below that submitted by the other two bidders and well below that secured the last time the same contract was bid. Hardy's bid price is also the only fiscally acceptable price submitted by any bidder. Hardy's bid also is responsive with the possible exception of the late issuance of the county storage permit, whose issuance

appears to have been simply a formality and the local restrictions on the amount of sludge which can be effectively stored in the storage facility, which restrictions the county may or may not be able to enforce.

Alternate Recommendation: If the Commission is not inclined to support award of the contract to Hardy, the contract should be rebid. The other two bidders have submitted fiscally unacceptable prices ranging from $498,080 to $812,210 above Hardy's bid price. Newman also failed to submit the required Site II haul permit by the deadline date established for bid clarifications. The contract should additionally be rebid on the open market and should include a mandatory minority subcontracting requirement of 30-40%, with the WSSC of course reserving the right under its Minority Procurement Policy of awarding the contract to a minority prime contractor who submits a bid within 10% of the low bid.

Letter of June 16, 1988 to Mark Rollinson returning protest package.
Exhibit K, Amended Complaint

June 16, 1988

CERTIFIED MAIL NO. 978194
RETURN RECEIPT REQUESTED

Mr. Mark Rollinson
Smith Rollinson
Attorneys at Law
603 King Street
Alexandria, Virginia 22314

Re: Protest Letter dated June 7, 1988 of IFB Contract No. 17224

Dear Mr. Rollinson:

I have reviewed your letter, dated June 7, 1988, and the above-referenced Invitation for Bids (IFB). Your letter protested the bid of Hardy and Son Trucking, Inc., and was submitted on behalf of your client, George D. Newman and Sons, Inc.

Although I appreciate your concern over the Hardy's bid, the submission of the bid is not a protestable matter. At this time, the bids received in response to the IFB are under evaluation and, to date, no award has been made. Therefore, I'm returning your protest package to you for possible resubmission at a later date.

If you have any questions, please call me at (301) 699-4839.

Sincerely,
BY: Sally C. Barkley OPPO, C.P.M.
Purchasing Agent

SCB:ah
Enclosure

Letter of June 22, 1988 to Cortez A. White
Director of Maintenance and Operations
Exhibit L, Amended Complaint

June 22, 1988

Cortez A. White
Director of Maintenance and Operations
Washington Suburban Sanitary Commission
c/o Purchasing Agent
4101 Lloyd Street
Hyattsville, Maryland 20781

Dear Mr. White:

This is to appeal the denial by the Purchasing Agent of a protest filed on June 7, 1988 on behalf of George D. Newman & Sons, Inc. against Hardy & Son Trucking, Inc. (a/k/a "John Hardy & Son, Inc.", "Hardy & Sons", and "Hardy & Son, Inc.", hereinafter "Hardy") in respect of IFB for Contract Number 17224, a copy of which protest is attached to this letter along with a copy of the June 16 advice of denial.

While the Purchasing Agent has characterized the rejection of the subject protest as being based upon timeliness, such rejection is both ill founded and tantamount to a rejection on the merits.

The error in the timeliness argument is explained in our response to the Purchasing Agent, a copy of which is enclosed.

The timeliness rejection being tantamount to rejection on the merits is obvious because, among other things, under your Rules, Newman & Sons would be prohibited from protest after award. The bases for protest became known to Newman & Sons shortly after bid opening on May

25, 1988. By your Rules, bases for protest must be submitted within 15 days after being known or knowable with reasonable diligence (see, for example, Paragraph 34.A. of Part One of the procurement documents). The 15 day period has expired.

Therefore, our protest has been denied and we hereby appeal.

Respectfully submitted,
BY: Mark Rollinson

cc w/o enclosures: The Commission and each
Commissioner
Kevin G. Newman
Earl Frazier

Letter of July 1, 1988 to Mark Rollinson from Cortez A. White, Exhibit M, Amended Complaint.

July 1, 1988

Mark Rollinson, Esquire
Smith Rollinson
603 King Street
Alexandria, VA 22314

Re: IFB, Contract Number 17224
Sludge Hauling and Disposal

Dear Mr. Rollinson:

This is in response to your correspondence dated June 22, 1988, in which you have appealed the denial, by the Commission's Purchasing Agent, of a protest filed June 7, 1988 on behalf of George Newman and Sons, Inc. After careful review and consideration of the package sent, as well as the referenced IFB, I have concluded that the Purchasing Agent responded properly in her June 16, 1988 denial to accept your protest under the contractual remedies provided by Commission policy.

Section 11 of the WSSC Purchasing Manual states in part, "Any actual or prospective bidder, offerer, or contractor who is aggrieved in connection with the solicitation or award of a contract* may protest. . ." (underlining in original text). It is obvious that your protest is not on the solicitation but on the anticipatory award of Contract No. 17224 to the apparent low bidder. At the time of your protest, investigation on the responsiveness of prospective bidder(s) was in progress by the Commission and no recommendation, let alone award, had been made. Therefore, no protestable action has been taken. As a

result, you are premature in your action and must wait until a decision has been made before an official protest may be accepted.

It is the Commission's responsibility to examine all information available to determine the responsiveness and responsibleness of bidders during bid evaluation prior to recommendation for award. Therefore, the information and areas of concern you provided in your original protest have been examined as part of our evaluation prior to making a recommendation for award.

Mark Rollinson, Esquire
July 1, 1988
Page Two

As you are aware from your attendance at the July 29 Commission meeting, the Commissioners did not approve the original recommendation of award to the apparent low bidder. The procurement action was remanded to staff for closer examination. . .especially of the alleged responsiveness shortcomings you argued exist in the apparent low bidder's ability to meet the IFB requirements. Once this reexamination is completed, staff position will be presented to the Commission.

If, when this is returned to the Commission for action, the apparent low bidder is still recommended for award and, if such an award is approved, you will be afforded fifteen (15) days from that date to resubmit your protest if you still feel it is valid.

Your conclusion that, ". . .under your rules, Newman and Sons would be prohibited from protest after award." is in error. Though information may be provided following a bid opening to assist the Commission in its bid evaluation process, a formal protest is not possible until a recommendation is completed

and an award has been made. To suggest that Commission rules would prohibit a bidder from protesting an award (because it was not madewithin fifteen (15) days of the bid opening) is in itself the real "obvious, logical absurdity." As far as your specific appeal on the decision rendered relative to IFB Contract No. 17224, as presented for your client, this is the final decision of this Commission in this matter.

Sincerely,

By: Cortez A. White
Director, Department of
Maintenance and Operations

CAW/nr

cc: Nathan Greenbaum, Esq.
Vicki Webb, Esq.
Joseph McNerney
Will Bowles
Sally Barkley